

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DEREK TODD WERDER,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11532
Trial Court No. 3VA-11-139 CR

MEMORANDUM OPINION

No. 6335 — May 25, 2016

Appeal from the Superior Court, Third Judicial District, Valdez,
Eric Smith, Judge.

Appearances: Josie Garton, Assistant Public Defender, and
Quinlan Steiner, Public Defender, Anchorage, for the Appellant.
Tamara E. de Lucia, Assistant Attorney General, Office of
Criminal Appeals, Anchorage, and Craig W. Richards, Attorney
General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock,
Superior Court Judge.*

Judge SUDDOCK.

Derek Todd Werder was convicted of a total of twenty-six counts of first-degree sexual abuse of a minor, first-degree sexual assault, third-degree assault, and

* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

fourth-degree assault based on his physical and sexual abuse of his stepdaughter and two of his sons. He received a composite sentence of 219 years' imprisonment with 69 years suspended.

Werder challenges his convictions, arguing that the trial court erred in denying his motion for a bill of particulars for seventeen of the charges. We conclude that the trial judge did not abuse his discretion in failing to order a bill of particulars — and that Werder, in any event, has failed to demonstrate that he was prejudiced by the court's denial.

Werder also challenges the sufficiency of the evidence supporting his first-degree sexual assault convictions, arguing that the State presented insufficient evidence that he had intercourse with the victim without her consent. For the reasons explained below, we conclude that the evidence was sufficient and affirm the convictions.

Further, Werder challenges his sentence, arguing that the trial judge erred in declining to refer his case to the three-judge sentencing panel for a sentence below the presumptive minimum. Werder additionally contends that his composite sentence was excessive. We reject both of these arguments and affirm Werder's sentence.

Factual background

Werder was arrested in August 2011 based on allegations that he physically and sexually abused his stepdaughter, K.S., and two of his minor sons. K.S. testified that Werder had been abusing her for as long as she could remember. When K.S. was approximately fourteen years old, Werder moved her into his bedroom and required his wife to occupy K.S.'s bedroom. Werder engaged in sexual intercourse with K.S. nearly every day, sometimes multiple times per day. K.S. specifically recalled abuse occurring each New Year's Eve. On at least three occasions, Werder forced two of his minor sons

to have intercourse with K.S. K.S. also testified that Werder was physically abusive toward the whole family.

Werder denied that any sexual activity occurred before K.S. turned eighteen, and he claimed that his relationship with K.S. was consensual thereafter. The defense theory was that Werder's family had fabricated the allegations of sexual abuse to get him out of the house because he was physically abusive. Werder called his mother as a witness, and she testified to a few occasions over the course of several years when Werder and K.S. were in separate locations. According to Werder, this testimony demonstrated that K.S. was lying when she asserted that Werder had intercourse with her every day.

The jury convicted Werder of all charges — sixteen counts of first-degree sexual abuse of a minor, three counts of second-degree sexual abuse of a minor, nine counts of first-degree sexual assault, five counts of third-degree assault, and one count of fourth-degree assault. The second-degree sexual abuse of a minor counts and five of the first-degree sexual abuse of a minor counts merged with four of the first-degree sexual abuse of a minor counts. Werder requested a referral to the three-judge sentencing panel for a sentence below the presumptive minimum sentence of 119 years' imprisonment. The sentencing judge declined Werder's request and sentenced him to 219 years' imprisonment with 69 years suspended — 150 years to serve. This appeal followed.

Why we affirm the trial court's denial of Werder's motion for a bill of particulars

K.S. testified to the grand jury that Werder had sexually abused her every day, and sometimes multiple times per day, for as long as she could remember. Based on this testimony, the grand jury indicted Werder on fourteen counts of sexual abuse of

a minor and three counts of sexual assault, with each of these counts charging conduct within individual one-year periods.

Prior to trial, Werder moved for a bill of particulars on these counts, arguing that he could not determine what conduct was being charged. Superior Court Judge Eric Smith denied the motion, concluding that Werder had sufficient notice of the State’s allegations — that Werder had intercourse with K.S. every day between May 30, 2007, and May 30, 2011. On appeal, Werder contends that this ruling was an abuse of discretion.

We rejected a similar contention in *Covington v. State*.¹ There, as in this case, the indictment charged acts of sexual abuse occurring over lengthy time periods based on the victim’s allegations that Covington had intercourse with her “practically every night.”² We found the indictment sufficiently specific to give Covington notice of the charged offenses, explaining that “leeway is necessary in charging sexual abuse and sexual intercourse with minors because children who are the victims of abuse may find it difficult to recall precisely the dates of offenses against them months or even years after the offense has occurred.”³

Werder argues that *Covington* is distinguishable because, in his case, the victim was able to recall some specific dates of abuse — *i.e.*, every New Year’s Eve from 2007 to 2011 — and the State asked the jury to convict him based on these representative dates. According to Werder, had the judge granted his motion for a bill of particulars, he could have developed alibis for those specific dates of alleged abuse.

¹ *Covington v. State*, 703 P.2d 436 (Alaska App. 1985).

² *Id.* at 438.

³ *Id.* at 439.

But as the State points out, Werder did not request a continuance to investigate an alibi, nor did he seek any other relief from the trial court after hearing K.S.’s testimony. And on appeal, Werder has not asserted that he would have been able to present an alibi with regard to the New Year’s Eve allegations. Thus, “[a]ny attempt to divine the likely effect of the alleged error in these circumstances would amount to pure speculation.”⁴

On the record before us, we conclude that Werder has failed to meet his burden of establishing that prejudice resulted from the arguable lack of specificity in the indictment. We accordingly find no reversible error.

Why we affirm Werder’s convictions for first-degree sexual assault

Werder also challenges the sufficiency of the evidence supporting six of his nine convictions for first-degree sexual assault.⁵ Werder was charged with nine counts of first-degree sexual assault based on allegations that he engaged in non-consensual sexual penetration with K.S. after she turned eighteen years old. Werder does not challenge the three counts that pertained to instances of sexual assault where Werder rendered K.S. incapacitated.

Specifically, Werder argues that the State presented insufficient evidence for a reasonable juror to conclude that Werder engaged in sexual penetration without K.S.’s consent.

⁴ *Copeland v. State*, 70 P.3d 1118, 1122-23 (Alaska App. 2003) (quoting *Sam v. State*, 842 P.2d 596, 599 (Alaska App. 1992)).

⁵ AS 11.41.410(a)(1).

When ruling on a claim of insufficient evidence, this Court considers the evidence in the light most favorable to the jury’s verdict and determines whether a fair-minded juror could find guilt beyond a reasonable doubt.⁶

Under AS 11.41.410, “[a]n offender commits the crime of sexual assault in the first degree if ... the offender engages in sexual penetration with another person without consent of that person.” Without consent means that a person, “with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone; or is incapacitated as a result of an act of the defendant.”⁷

K.S. testified that Werder perpetrated acts of physical abuse against family members every day, and that Werder threatened to kill the entire family if K.S. tried to leave or if she revealed the abuse. On one occasion, K.S. told Werder that she could leave once she reached adulthood; Werder held a handgun to her head and asked, “Do you really think you can leave now?” K.S. also testified that she continued to have intercourse with Werder because she “truly believed that [Werder] was going to kill [her] family.”

Thus, the State presented evidence that Werder perpetrated the abuse in coercive circumstances as defined by statute — and that K.S. believed she could not resist the abuse because of Werder’s threats. This evidence was sufficient for a rational juror to conclude that the sexual penetration occurred without consent. We accordingly reject Werder’s sufficiency challenge.

⁶ *Lawrence v. State*, 269 P.3d 672, 675 (Alaska App. 2012).

⁷ AS 11.41.470(8).

Why we affirm Werder's sentence

Werder challenges his sentence, arguing that the trial court erred in declining to refer Werder's case to the three-judge sentencing panel. According to Werder, a sentence within the presumptive range was manifestly unjust because it was effectively a life sentence, and thus it gave no weight to the sentencing goal of rehabilitation.

Under AS 12.55.165, a sentencing court shall refer a case to the three-judge panel if it “finds by clear and convincing evidence that manifest injustice would result from ... imposition of a sentence within the presumptive range.”⁸ When a defendant seeks referral, “the sentencing judge must undertake an analysis of the lower end of the sentencing range allowed by the presumptive sentencing law,” and then ask “whether this lowest allowed sentence would still be clearly mistaken under the sentencing criteria first announced by the supreme court in *State v. Chaney*.”⁹

For his convictions, Werder faced a presumptive minimum sentence of 119 years' imprisonment. Judge Smith found that Werder's crimes were “horrific” and were “part of an extreme and destructive strategy of control over the victims.” He also noted that Werder had engaged in “years and years of predatory behavior,” which included many uncharged incidents of sexual abuse. Based on these findings, Judge Smith concluded that Werder “fit directly into what the legislature had in mind of someone who's convicted of a sex crime.” The judge thus ruled that a sentence within the presumptive range would not result in manifest injustice, and we find no error in this conclusion.

⁸ AS 12.55.165(a).

⁹ *Harapat v. State*, 174 P.3d 249, 254 (Alaska App. 2007).

Werder also challenges his sentence as excessive, summarily arguing that “it was gratuitous and unnecessary to impose additional time to fulfill the required sentencing criteria.” At sentencing, Judge Smith carefully evaluated each of the *Chaney* criteria and concluded that the factors of affirmation of societal norms and general deterrence should take precedence.¹⁰ The judge thus sentenced Werder to 219 years’ imprisonment with 69 years suspended — 150 years to serve.

We have previously upheld sentences that effectively equaled a life sentence in cases involving exceptional circumstances.¹¹ Given the duration and particularly heinous nature of Werder’s crimes against multiple members of his family, we cannot say that Werder’s sentence of 150 years to serve was clearly mistaken.¹²

Conclusion

We AFFIRM the judgment of the superior court.

¹⁰ See *State v. Chaney*, 477 P.2d 441, 443-44 (Alaska 1970); see also AS 12.55.005.

¹¹ See *Hastings v. State*, 736 P.2d 1157, 1160 (Alaska App. 1987); see also *Nukapigak v. State*, 663 P.2d 943, 944-45 (Alaska 1983).

¹² See *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).